IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

TONY HILLARD,
Reg. No. B-58149,
Danville Correctional Center

Petitioner

vs.

JOSEPH LOFTOS, Warden,
Danville Correctional Center

Respondent

08CV1775
JUDGE GETTLEMAN
MAGISTRATE JUDGE MASON

HABEAS CORPUS PETITION PURSUANT TO 28 U.S.C. SECTION 2254

This is a Habeas Corpus Petition filed on behalf of a State prisoner pursuant to 28 U.S.C. Section 2254.

Procedural History

Defendant is incarcerated in Danville Correctional Center under a sentence of 50 years imposed by the Honorable Michael P. Toomin in Case No. 97-CR-30453.

Defendant's case was affirmed on direct appeal on June 11, 2001, People v. Hillard, No. 1-99-0152, Rule 23 Order. Thereafter, defendant filed a pro se Post-Conviction Petition. After counsel was appointed, an Amended Post-Conviction Petition was filed. It was denied. The denial was affirmed on appeal on June 15, 2007. Time to file a Petition for Leave to Appeal was extended by order dated July 31, 2007 to August 20, 2007. The Petition for Leave to Appeal was denied on November 29, 2007.

Statement of Facts

This Statement of Facts is created both from facts presented in the original Motion to Suppress and original trial, which were reviewed by the trial court in making its conclusion after hearing evidence in the post-conviction hearing and evidence presented in the post-conviction hearing.

On May 10, 1997, Yinka Jinadu entered the apartment of his estranged wife. He was there set upon, beaten and kidnapped by a number of men. He testified to a general description. His testimony was:

"Q: Was he able to give you any name or physical description of the other three male black offenders?

A: Yes.

Q: What were those descriptions that he gave you?

A: He described them as being in there twenties, one individual -- male blacks, one individual he had no height but for the weight was one sixty with brown eyes and black hair.

The second individual was five foot ten inches tall and he weighed -- No. Five foot eleven inches tall and he weighed two hundred pounds, black and brown eyes -- brown eyes and back hair.

The third offender was five foot eleven, one sixty-five, brown eyes, black hair. And another individual was five foot five, one forty-five, brown eyes, black hair." (B-12-B-13)

During the investigation, it was determined that a gun found at the apartment was registered to Loretha Hillard, defendant's sister. She reported the gun missing on May 19, 1997.

At the Motion to Suppress, Det. Bradley testified that defendant's sister stated the gun had been taken and that if anyone took the gun, it would be her brother Tony. (Tr. B-18)

She advised the police where defendant lived. On June 3, 24 days after the information was received, the police went to the address given by the sister, that defendant at first did not admit to the name of Tony Hillard; defendant denied he took the gun; admitted his name and was arrested. He was identified at a line-up.

The trial judge, in denying the Motion to Suppress, stated:

> "The central issue obviously to be resolved is whether this adds up to probable cause to arrest Mr. Hillard. What we have basically is a gun used in an armed robbery and a beating, recovered at the scene, linked to the sister of the defendant and then to Mr. Hillard. We have the defendant in a place where the sister indicated he would be, fitting the general description of one of the offenders and the defendant initially giving a phony name to the police. This adds up to reasonable grounds to believe that the defendant had committed an offense and probable cause to arrest him.

The motion to quash arrest and suppress evidence shall be denied." (B-112-113)

In a Supplemental Post-Conviction Petition, it was alleged in part that trial counsel was ineffective because counsel failed to present evidence, testimony of defendant's sister, refuting the assertion by Officer Bradley as to what defendant's sister is alleged to have told him.

The State's Motion to Dismiss was denied. At the hearing on the Post-Conviction Petition, defendant's sister testified she never told Det. Bradley that defendant could and/or would have stolen the gun. She testified only her sister knew where she kept her gun (Tr. 14F); that many relatives and friends would come to her apartment (Tr. 16F); people would be in her apartment when she was not home. (Tr. 17F) She testified she told Police Officer Bradley that she had no idea who took the gun (Tr. 21F); that she never told the police where Tony lived. (Tr. 21F) She testified she spoke to defendant's Public Defender, Ms. Bormann, a few times on the phone (Tr. 24F) and once in person in court. (Tr. 24F) She told Ms. Bormann that she never said to police that only defendant could have stolen the gun. (Tr. 24F) She told Ms. Bormann prior to the Motion to Suppress that she was ready and willing to testify. (Tr. 24F-25F) She testified she did not recall Ms. Bormann coming to her house.

Ms. Cheryl Bormann, the Assistant Public Defender who represented defendant at trial, testified at the post-

conviction hearing. (Tr. 42F) At the time of her testimony, she was a supervisor in the Public Defender's Office.

In the post-conviction hearing, defendant was represented by an Assistant Public Defender.

Ms. Bormann testified she and her 711 assistant met in person with defendant's sister at the sister's apartment (Tr. 49F, 50F, 51F) and the sister told her, Ms. Bormann:

"Q: Did you ask her about whether Tony Hillard could have access to that gun?

A: I specifically ask that question because that was the issue and she told me that yes Tony, like all of her other family members and friends, would have known where the gun was and could have had he wanted to make himself -- could have availed himself of the gun.

Q: Did you also talk to her about a phone conversation she had with the police about that gun?

A: I did.

Q: And what did she tell you relative to that conversation?

A: I asked her whether or not she had said to a police officer regarding the theft of the gun that the only person who could have stolen the gun was Tony Hillard.

I asked that specific question because that statement is contained in the police report in this case. She denied making that statement to a police officer.

She indicated instead that she told police officer exactly what they told me, Mogul and I, that Mr. Hillard along with many of her other acquaintances and family members could have access to the gun." (Tr. 50F-51F)

She also testified it was her tactical choice not to call Ms. Hillard.

The trial court rejected Ms. Hillard's version and accepted that Ms. Bormann made a tactical decision not to call Ms. Hillard. (Tr. 114F)

At the post-conviction proceeding, defendant was represented by an Assistant Public Defender. Ms. Bormann who originally represented defendant at trial was at the time of the post-conviction proceedings a supervisor in the Public Defender's Office.

Argument

1.

The decision of the District Court and the Court of Appeals on the issue whether there was prejudice to defendant by counsel's actions is contrary to the controlling facts and contrary to the decision of the United States Supreme Court.

Although the State Appellate Court initially stated the issue of effective assistance was waived, the Court did consider the issue.

The State court relied on People v. Robinson, 299 Ill.App.3d 426.

People v. Robinson, 299 Ill.App.3d 426, 701 N.E.2d 231, relied on by the Appellate Court, and the other cases relied on in Robinson were factually very different than here. In

those cases, the police saw defendant shortly after the crime in the general area of where the crime occurred. Here, where the police saw defendant 20 or more days after the crime and not in the vicinity of the crime and where the description was very general, the general description, even when joined by the other facts, cannot demonstrate probable cause. In Robinson, supra, the court stated "Police stopped defendant shortly after the incident occurred and in close proximity to the scene of the crime." The other cases relied on by the court in Robinson all related to incidents where the time and place were in close proximity. The court in Robinson stated:

> "In *People v. Wilson*, 141 Ill.App.3d 156, 95 Ill.Dec. 848, 490 N.E.2d 701 (1986), police received a description of a man with a gun walking north wearing a gray hat, maroon and gray striped sweater, black pants and a black coat.... The court noted that police saw defendant in the area described, his clothing matched the description given, and he was walking in the direction noted in the description....
>
> Likewise, in *People v. Starks*, 190 Ill.App.3d 503, 137 Ill.Dec. 447, 546 N.E.2d 71 (1989), a defendant convicted of attempted murder and armed robbery argued that he was improperly stopped and arrested by police. The description of the robbery suspect included his race, approximate height and weight, and color and type of clothing. The defendant was stopped and arrested in a

vehicle approximately 20 minutes after the robbery and a block and a half from the scene of the crime." (Emphasis added.)

In Search and Seizure, Fourth Edition, LaFave, Section 3.4(c), p. 253, in a summary of the case law, it is concluded where there is a most general description and the defendant is seized long after the crime and not in the general vicinity, there is no probable cause.

A review of the cases that deal with arrest based on general suspicion would have advised defense counsel at trial, defense counsel on appeal and defense counsel at post-conviction hearing that the arrest in this case could not be based on the general description. See in LaFave, supra, p. 254, case of Com v. Richards, 458 Pa. 455, 327 A.2d 63.

In the instant case, the description was very general and did not contain the uniqueness of the description where arrests have been upheld. (See LaFave, supra, p. 256.) Here, the crime occurred on May 10 and defendant was arrested on June 3. Also he was not seen in the general area of the crime. Defense counsel at the Motion to Suppress failed to argue this very important distinction and failed to support the argument with case law. (Original Trial, Tr. B-96-B-109)

The law as set out in LaFave is so persuasive that only total lack of effectiveness by counsel can explain the failure to cite these cases.

If trial defense counsel would have researched the issue,

i.e., general description as basis for arrest, he would have found that such general description, as here, would not support an arrest when defendant is not seen shortly after the crime and in the general area of the crime.

The failure of a lawyer to research for controlling case law is ineffective assistance of counsel. See People v. Wright, 111 Ill.2d 18, 488 N.E.2d 973; Dixon v. Snyder, 266 F.3d 693 (7 Cir. 2001). The failure of counsel to investigate the law is equivalent to failure to investigate and find important exculpatory facts. Workman v. Tate, 957 F.2d 1339; People v. Truly, 230 Ill.App.3d 948, 595 N.E.2d 1230.

If defendant's Motion to Suppress his arrest had been granted, his out-of-court identification at the line-up must be suppressed, United States v. Crews, 445 U.S. 463, 63 L.Ed.2d 537, and the State could only present an in-court identification if it could prove there existed independent origin. United States v. Crews, supra. If the out-of-court or the in-court identifications had been suppressed, defendant would have probably been acquitted.

The State had conceded that on June 3 at defendant's house, defendant was arrested. Since the police had no warrant and did not observe defendant committing a crime, the State had the burden to prove there existed at the time of defendant's seizure probable cause to arrest defendant. People v. Talley, 34 Ill.App.3d 506, 340 N.E.2d 167.

The arrest of defendant was based primarily on a general

description. The victim testified:

"Q: Was he able to give you any name or physical description of the other three male black offenders?

A: Yes.

Q: What were those descriptions that he gave you?

A: He described them as being in there twenties, one individual -- male blacks, one individual he had no height but for the weight was one sixty with brown eyes and black hair.

The second individual was five foot ten inches tall and he weighed -- No. Five foot eleven inches tall and he weighed two hundred pounds, black and brown eyes -- brown eyes and back hair.

The third offender was five foot eleven, one sixty-five, brown eyes, black hair. And another individual was five foot five, one forty-five, brown eyes, black hair." (B-12-B-13)

If trial counsel had provided effective assistance of counsel, no court could find under controlling law the existence of probable cause. In finding the existence of probable cause, the trial court (later adopted by the Appellate Court) found three facts when combined provided probable cause. They were:

(a) Defendant fit a general description of a person involved in a crime.

(b) The alleged statement of Loretha Hillard "That the

only person who would have taken her gun was her brother Tony Hillard." (00028)

(c) Defendant at first did not admit to his name.

The fact that defendant fit the general description was considered by the trial court and the Appellate Court as the most important fact in finding the existence of probable cause. Ruling of trial court. (Original Trial, Tr. B-112-B-113) There, the trial court stated:

> "We have the defendant in a place where the sister indicated he would be, fitting the general description of one of the offenders and the defendant initially giving a phony name to the police. This adds up to reasonable grounds to believe that the defendant had committed an offense and probable cause to arrest him." (B-112-B-113)

The Appellate Court agreed.

Officer Brady testified defendant fit the general description of all the people described by the victim. (B-73) The Public Defender failed to effectively handle the facts referred to in paragraphs (a) and (b). Here, the general description relied on was a black man, 5'11", 165 pounds in his twenties. Defendant as 5'11", 170 pounds and 21. Although a general description may be a basis for an arrest under certain circumstances it cannot be, not under the circumstances here where there was a substantial time and location difference between the crime and the observation of defendant. The crime occurred on May 10. Defendant was

arrested on June 3. Defendant was not arrested in the vicinity of the crime. For a general description to provide a basis for arrest, defendant must be seen shortly after the crime and in the vicinity of the crime.

The facts here demonstrate that applying the standard set by the United States Supreme Court, the court would have found ineffective assistance of counsel.

Defense counsel also failed to properly demonstrate that any alleged statement concerning who could steal the gun has no real value in proving existence of probable cause. This statement, "That the only person who would have taken her gun was her brother Tony Hillard." (C00028, Opinion of Appellate Court), or as Det. Bradley testified, "If her gun was stolen the only person who could have stolen it would have been her brother." (Motion to Suppress, Original Trial, March 5, 1998, Tr. B-20) are mere speculations. It is surmise. Such speculation or surmise cannot rise to the level of probable cause.

The other fact relied on by the court is not probable cause. The mere fact that a person refuses to provide cooperation with police investigation is not evidence of guilt. Refusing to provide a name is not flight or physical resistance. It is not probable cause.

The other ineffective act of defense counsel is failure to call Ms. Hillard to testify she never told Police Officer Bradley that the only person who could steal the gun was her

brother. Ms. Bormann testified she interviewed Miss Hillard and was told she never stated that. (Tr. 51) Ms. Bormann testified:

"Q: Did you ask her about whether Tony Hillard could have access to that gun?

A: I specifically ask that question because that was the issue and she told me that yes Tony, like all of her other family members and friends, would have known where the gun was and could have had he wanted to make himself -- could have availed himself of the gun.

Q: Did you also talk to her about a phone conversation she had with the police about that gun?

A: I did." (Tr. 50F-51F)

She testified she made a strategic decision not to call Miss Hillard because of credibility concerns. (Tr. 54F, 79F) She testified she was concerned that if she called Ms. Hillard, evidence from her would be similar to that provided by Det. Bradley. (Tr. 53F) She testified:

"Q: Did you call Loretha Hillard at the motion to quash arrest and suppress hearing?

A: No.

Q: Why not?

A: Because Ms. Hillard, under oath made it very clear that she would deny having that conversation with the officer on the phone, placed a link between Ms. Hillard on the gun in question. At that point no such

link other than hearsay was going to be made at trial and I wanted to keep it that way." (Tr. 53F)

She could have made a determination if such evidence would have been admitted by making a pre-trial Motion in Limine. Her decision was flawed by her failure to make a Motion in Limine before the hearing on the Motion to Suppress. If she had, she would have known if the court would have admitted (as it ultimately did) Ms. Hillard's alleged statement to Officer Bradley. If the court was to admit this evidence, no harm would occur from providing the State with additional evidence of defendant's possible connection to the gun. Surely, no harm would have been done where Ms. Hillard would have testified that many others also had availability to steal the gun. Hence, an additional major defect in counsel's action was making a strategic decision without conducting proper investigation as to what evidence would be admitted. This is the equivalent of not properly researching the proper law or not investigating relevant facts. This is ineffective assistance. See People v. Wright, 111 Ill.2d 18, 488 N.E.2d 973; Workman v. Tate, 957 F.2d 1339. Here, because of ineffective assistance of counsel as described above, defendant was prejudiced by defendant's illegal arrest and by the out-of-court identification not being suppressed, and possibly the in-court identification not being suppressed.

The decision of the State court as to whether there was a fair hearing with proper representation for defendant is also contrary to the decision of the United States Supreme Court.

The decision of the State court is contrary to the decision of the United States Supreme Court.

2.

The decision of the State court is contrary to the decision of the United States Supreme Court. The decision of the trial court denying defendant a new trial in a post-conviction hearing must be overruled because the Assistant Public Defender, Ms. Bormann, defendant's original trial counsel, who was accused of ineffective assistance of counsel in representing defendant, was a supervisor in the Public Defender's Office at the time of the post-conviction hearings, where defendant was represented by an Assistant Public Defender.

Defendant at a post-conviction hearing is not guaranteed effective assistance of counsel under the Sixth Amendment to the United States Constitution, People v. Harden, 217 Ill.2d 289, 840 N.E.2d 1205, and is only guaranteed the level of assistance of counsel guaranteed by the Post-Conviction Hearing Act, Harden, supra, i.e., "reasonable assistance." Defendant was denied such reasonable assistance. This defect interfered with defendant's ability to prove he was denied effective assistance of counsel at trial. Here, at the time of the post-conviction hearing, defendant's prior trial counsel, Ms. Bormann, who was accused of providing ineffective assistance of counsel, was now a supervisor in the Public Defender's Office. (Tr. 42F-43F) In People v. Banks, 121 Ill.2d 36, 520 N.E.2d 617, the court overruled its prior decision of People v. Smith, 37 Ill.2d 622, 230 N.E.2d 169. In

People v. Smith, supra, the court held a per se conflict existed when one Public Defender must question the effectiveness of another Public Defender. In People v. Banks, supra, the court held that where such situation exists "a case by case inquiry should be conducted to determine if there is the presence of an actual conflict...." Banks, 121 Ill.2d at 44, 520 N.E.2d 617.

The court in Harden, supra, interpreting when a hearing should be held, stated:

> "In the context of a potential conflict between two public defenders,... Relevant factors include ... whether they were in hierarchical positions where one supervised or was supervised by the other."(Emphasis added.)

Here, Ms. Bormann was a supervisor. This should have required a hearing as to the relationship of Bormann and Public Defender, Elyse Krug Miller.

In Banks, supra, the court held it is permissible for one Public Defender to raise the ineffectiveness of another Public Defender. The court stated:

> "Our subsequent cases, however, evidence our understanding of the special nature of public defender's offices where conflict of interest are concerned. Public defender's offices, we have recognized, are unlike private law firms for purposes of conflicts of interest. While a conflict of interest among any member of a

> private law firm will disqualify the entire firm (*People v. Stoval* (1968), 40 Ill.2d 109, 239 N.E.2d 441), the disqualification of an assistant public defender will not necessarily disqualify all members of that office (*People v. Robinson* (1979), 79 Ill.2d 147, 37 Ill.Dec. 267, 402 N.E.2d 157). In *Robinson* it was urged that where an assistant public defender is disqualified by reason of a conflict of interest then all other assistants in that office should be *per se* disqualified since these other assistants' loyalty to their office would conflict with their loyalty to their clients. The court rejected this contention, reasoning that any such loyalty to one's office was too remote to justify a *per se* conflict of interest rule." (Emphasis added.)

The court's reasoning does not apply where one Public Defender alleged to be incompetent is a supervisor, i.e., in a superior position in the Public Defender's Office. An Assistant Public Defender may not want to jeopardize his job or his job assignment or other intangible benefits by too strenuously attacking a supervisor in the Public Defender's Office. The Assistant Public Defender making the attack may have a subliminal fear of "self-harm" by attacking a person with greater power--a supervisor in the Public Defender's Office. Here, there should have been a hearing.

The rule of People v. Banks, supra, is contrary to the

holding of other sister States. See State v. Florida, 617 So.2d 781 (State of Florida, 1993); Ryan v. Thoms, 261 Ga. 661, 409 S.E.2d 507 (Ga. 1991), cited with approval in Ware v. State, 267 Ga. 510, 480 S.E. 999 (Ga. 1997); District Court for the Twenty First Judicial District v. Buss, 783 P.2d 1223, Cal. Supreme Court. There, the court rejected the Illinois Rule. See Angarano v. United States, 329 A.2d 453 (D.C. App. 1974) rejecting People v. Banks, supra rule and adopting People v. Smith, 37 Ill.2d 622, 230 N.E.2d 169 (1967) rule.

The position in the above cases was based on United States Supreme Court precedent. This Court must re-evaluate the validity of Banks.

The Illinois Supreme Court in People v. Banks, supra, rejected the well-reasoned opinion in People v. Smith, supra, by distinguishing the loyalty of lawyers in a Public Defender's Office to the Public Defender's Office and to the other members of the Public Defender's Office, from the loyalty of private attorneys to their firms and other members of their firms.

This is an irrational distinction. It is unsupported by any data from any survey. It is based on an irrational presumption. Hence, it is unconstitutional. Tot v. United States, 319 U.S. 463, 87 L.Ed. 1514.

There is no real difference between how lawyers function in a private law firm and in a Public Defender's Office. The decision in Banks must be reconsidered.

CONCLUSION

For any and all of the foregoing reasons, the petition for a writ of habeas corpus should be allowed.

Respectfully submitted,

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